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SUPREME COURT OF THE UNITED STATES

October Term 1959

No. ~~917~~ 83

MAX CARR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, ... Petitioner

v.

R. A. YOUNG, *et al*, ... Respondents

ERNEST T. GEPHARDT, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, ... Petitioner

v.

EVERETT TUCKER, JR., *et al*, ... Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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May 4, 1960

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Max Carr and Ernest T. Gephardt, petitioners, pray the Court to issue a writ of certiorari to review the decision of the Supreme Court of Arkansas in the cause styled *Max Carr, et al* v. *R. A. Young, et al* and the order denying the petition for rehearing therein and for cause show:

Opinion of Court Below

The decree of the Chancery Court of Pulaski County, Arkansas (R.75), is unreported.

The decision of the Supreme Court of Arkansas affirming this decree is not yet reported in the official reports but appears in the unofficial reports in 331 S.W. 2d 701. A copy of said opinion appears in the appendix at

page 21. The petition for rehearing in the Supreme Court of Arkansas was timely filed on February 16, 1960 (R.178). A copy of said petition appears in the appendix at page 28. Rehearing was denied by the Supreme Court of Arkansas on February 29, 1960 (R.180).

Jurisdiction

The decision of the Arkansas Supreme Court affirming the decree of the Pulaski County Chancery Court was rendered and judgment was entered on February 8, 1960.

The date of the order denying the petition for rehearing was February 29, 1960.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257(3).

The federal questions sought to be reviewed were raised in the original complaints (R.10,62) and were presented and argued in the brief, oral argument and petition for rehearing (R.178) before the Supreme Court of Arkansas, which affirmed the Chancery Court decree sustaining the validity of the statute in question against the allegations that it is repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Arkansas by statute requires all educational personnel in public schools and institutions of higher learning to file annually an affidavit listing without limitation every organizational membership and regular contribution made for the past five years. The Arkansas Supreme Court construed this to require disclosure of membership in "a nudist colony", in "a drag-racing club", in "an association of atheists" and in "other organizations that

might be listed almost without number". The organizational membership and contribution affidavit must be filed with the appropriate school governing body which is free to disclose the contents generally. The question presented is whether this statute on its face and as applied to a University music professor and a high-school vocational printing instructor (who have filed non-communist disclaimers), unconstitutionally deprives them of rights of speech, press, association, religion and academic freedom guaranteed by the Fourteenth Amendment.

Statute Involved

"Act 10 of the Second Extraordinary Session of 1958 of the General Assembly of Arkansas"

AN ACT TO PROVIDE ASSISTANCE IN THE ADMINISTRATION AND FINANCING OF PUBLIC SCHOOLS, AND TO REQUIRE AFFIDAVITS FROM ADMINISTRATIVE AND PROFESSORIAL EMPLOYEES, INCLUDING SUPERINTENDENTS, PRINCIPALS, AND INSTRUCTORS OF THE ELEMENTARY AND SECONDARY SCHOOLS, AND COLLEGES AND UNIVERSITIES OF THE STATE OF ARKANSAS RELATIVE TO ALL INCORPORATED AND/OR UNINCORPORATED ASSOCIATIONS AND ORGANIZATIONS TO WHICH THEY HAVE BELONGED OR HAVE BEEN AFFILIATED WITH FOR THE PAST FIVE YEARS; TO PROVIDE PENALTIES FOR FAILURE TO COMPLY, AND FOR OTHER PURPOSES.

Be it Enacted by the General Assembly of the State of Arkansas:

SECTION 1. It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be

beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

SECTION 2. No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.

SECTION 3. Such affidavit may be in substantially the following form:

STATE OF ARKANSAS)

COUNTY OF .....)

I, (name of affiant), being an applicant for the position of ..... at (name of school or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others:

(Names and addresses of organizations)

and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others:

(Names and addresses of organizations)

.....

Signature of Affiant

Subscribed and sworn to before me this ..... day of ....., 19.....

.....

Signature and Title of Official

SECTION 4. Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action

shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

SECTION 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach in any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

SECTION 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

SECTION 7. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

Approved: September 12, 1958

Statement of the Case

Prior to the reopening of Arkansas schools in the fall of 1958, and immediately following the decision of the United States Court of Appeals for the Eighth Circuit in *Cooper* v. *Aaron*, 257 F. 2d 33, concerning desegregation of the public high schools in Little Rock, Arkansas, the Governor of the State of Arkansas in August, 1958, called a Second Extraordinary Session of the General Assembly for the purpose of enacting anti-desegregation legislation (R.166).

At this session a number of measures were enacted to achieve the overall purpose of non-compliance with the decision in *Brown* v. *Board of Education*, 347 U.S. 483. One of these measures enacted was Act 10, the validity of which is here in issue. This statute provides that no person shall be employed in a teaching capacity in any public school or public institution of higher learning in the State of Arkansas unless he shall have executed an affidavit to be filed with appropriate school officials listing all organizations with which he has been associated through membership or contribution for the past five years. A new affidavit is required to be executed each year. Any contract entered into by a school governing board with a teacher who has not executed the required affidavit is made void, and no such teacher can be paid any compensation for services from public funds. Under the Act, the execution of a false affidavit constitutes perjury, with a penalty provided therefor of loss of teaching license and the imposition of a fine of from $500 to $1,000.

Petitioner Max Carr was an associate professor of music who had been on the faculty of the University of Arkansas since the fall of 1955. No question had ever been raised by the University administration as to his qualifications to continue teaching except his refusal to

execute the affidavit required by Act 10 (R.81). Indeed, the President of the University testified that but for the requirements of Act 10, Carr's teaching services would be continued and were very much desired by the University (R.99).

Petitioner Ernest T. Gephardt had been a vocational printing instructor at Central High School in Little Rock since August, 1957. No school authorities had ever criticized Gephardt's qualifications to continue teaching (R. 111). The Superintendent of Schools of Little Rock testified that Gephardt's reemployment was recommended by his principal and but for the requirements of Act 10 his employment as a teacher would be continued (R.129).

Respondents are charged with the duty of employing teaching and supervisory personnel in a public institution of higher learning and in a public school system. The responsibility for enforcement of Act 10 is placed upon them and each has required the filing by all teaching personnel of the affidavit required by Act 10 as a condition of employment.

On June 10, 1959, petitioner Carr, recognizing that there are legitimate areas of inquiry by school authorities into the activities and associations of teachers, executed an affirmation (he being conscientiously opposed to taking an oath or swearing in any form) in which he listed his membership in professional organizations; denied ever having been a member of any subversive organization; and offering to answer any questions which the University authorities might constitutionally ask touching upon his qualifications to continue as a teacher (R.82).

A similar affidavit was executed by petitioner Gephardt and filed with the Little Rock School Board on May 4, 1959 (R.67,110). No question was ever raised as to his associations or activities (R.111).

Subsequently, both petitioners were informed that their non-compliance with Act 10 rendered their continued employment as teachers impossible. The suit by petitioner Carr was instituted on June 10, 1959, against the Board of Trustees of the University of Arkansas, the President of the University and the Attorney General of Arkansas. The action by petitioner Gephardt was instituted on June 19, 1959, against the Little Rock Special School District and its Board of Directors, the Superintendent of Schools of Little Rock and the Attorney General of Arkansas.

Both suits for declaratory judgments that Act 10 is unconstitutional and for injunctive relief against its enforcement were instituted as class actions in accordance with Arkansas law and, since the issues were the same in both cases, they were consolidated for hearing on June 25, 1959, by the trial court and were treated as consolidated cases by the Supreme Court of Arkansas on appeal.

Reasons for Granting the Writ

The Writ Should Be Granted Because the Decision of the Arkansas Supreme Court Denies Petitioners Important Constitutional Rights, Raises Federal Questions of Vital Importance to the Academic Community Throughout the South and the Nation, Conflicts With Applicable Decisions of This Court, and Raises Issues Similar to Those Now Pending Before This Court

Act 10 was enacted as part of a "package" in the Second Extraordinary Session of the Arkansas General Assembly of 1958, called by Governor Faubus following the decision by the Eighth Circuit Court of Appeals reversing the District Court order postponing integration in Little Rock's Central High School. *Cooper* v. *Aaron*,

257 F. 2d 33 (8th Cir. 1958). The Governor's Proclamation recited that "conditions exist that in my judgment and in my opinion, seriously endanger public education in the State of Arkansas, and the peace and tranquility of this State". 3 Race Rel. L. Rep. 1037 (1958). The Governor told the opening session of the Legislature that "The NAACP objective of the moment is the successful integration of Central High School . . . This is not a half serious problem, and it cannot be met with half measures. The bills I have recommended to you are the product of many fine and able minds, and represent a great deal of hard work. I ask that you consider these measures as a package program." Id. at 1041-2 (R.166).

Teaching appointments throughout Arkansas are for a one-year term, and Act 10 requires that teachers, and applicants for teaching positions, file annually an affidavit disclosing all organizational memberships and regular organizational contributions for the past five years. These affidavits are filed with each school governing authority, which is free to give them broadscale publicity.

A. The Constitutionality of Act 10 is a Matter of Vital Concern to the Academic Community throughout the South and the Nation

"The *Brown* decision shattered previous court precepts but not the South's belief in segregation. Belief begat the will to resist." *Report of the United States Commission on Civil Rights* 233 (1959). "Interposition", impeachment resolutions, school-closing, public education by private institutions, and champerty laws, are some of the techniques utilized to resist the efforts by Negroes and interested citizens to end a segregated system of public education. One such device, *exposure*, has been widely utilized throughout the South to ham-string the effectiveness of the organizations dedicated to effectuation of this

Court's decision in *Brown*. Tax proceedings against the NAACP with the demand for the membership lists is one form of known exposure. See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, and *Bates* v. *City of Little Rock*, 361 U.S. 516. State legislative investigation committees with power to subpoena NAACP members and sympathizers is another form of known exposure. See *Scull* v. *Virginia*, 359 U.S. 344. The device in issue here, i e. to require all teachers to list their organizational memberships and contributions is another route to the same destination—emasculation of any group favoring compliance with this Court's decision in regard to desegregation in public schools.

Should the decision below stand, it is readily apparent that other states in the South would follow this lead. The consequence to the Southern teacher is disaster. Either he leaves the South as did some Arkansas professors, see *Aid to the Arkansas Professors*, 46 *AAUP Bulletin* 19 (1960), or he remains in the South without engaging in thought; for thinking leads to action, and in this day and age, action leads to organizational membership and support. We have emphasized the impact of the decision below on the Southern teacher, but the impact on organizations anywhere in the nation which rely on teachers for intellectual guidance and financial support, and the impact on students generally, is of equal significance.

Making available information which might indicate that members of the teaching profession favor compliance with the law of the land is not a legitimate end of legislation. The proper purposes of academic freedom and individual constitutional rights may have to accomodate themselves to the compelling interests of national security, but they should not be subordinated to such ingenuous attempts to subvert the law.

The proper function of schools, colleges and universities is to teach, not only familiar facts, but also to extend the boundaries of knowledge and to develop the intelligence and mental power of youth. To accomplish this a high degree of freedom of research, of teaching, of learning and of association for these purposes are indispensable.

This was recognized by this Court in *Sweezy* v. *New Hampshire*, 354 U.S. 234, where the Court said, at p. 250: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

B. The Decision Below Conflicts with Applicable Decisions of This Court and Applies Others in a Fashion and Situation Never Intended by this Court

The decision below—that the State can annually force teachers to disclose, without any assurance of confidentiality, religious, political, fraternal, social, recreational, and every other kind of association—conflicts with applicable decisions of this Court. *Bates* v. *City of Little Rock*, *supra*; *N.A.A.C.P.* v. *Alabama*, *supra*; *Watkins* v.

United States, 354 U.S. 178; *Sweezy* v. *New Hampshire*, *supra*; *Wieman* v. *Updegraff*, 344 U.S. 183; *Thomas* v. *Collins*, 323 U.S. 516. As stated in *N.A.A.C.P.* v. *Alabama*, *supra*, at p. 462: "'A requirement that adherents of particular religious faiths or political parties wear identifying arm bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

The Arkansas Supreme Court based its decision upon the cases decided by this Court that some inquiry may be made into the past associations and activities of public employees generally and teachers specifically. See *Adler* v. *Board of Education*, 342 U.S. 485; *Garner* v. *Los Angeles Board of Public Works*, 341 U.S. 716; *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399; *Lerner* v. *Casey*, 357 U.S. 486; *Slochower* v. *Board of Education*, 350 U.S. 551.

In its opinion the court below said:

> "In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or

hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10."

The Arkansas Court's reliance on this Court's decisions in *Adler, Garner, Beilan, Lerner* and others is entirely misplaced. The results in those cases were reached by balancing the dangers of forced disclosure against the evils of communism and justified by compelling public necessity. See *Barenblatt v. United States*, 360 U.S. 109. The Court below made no effort to "balance" the interest of private societal relationships against the necessity for state information. Indeed, such a balancing could only have resulted in a ruling for the individual, as here petitioners had already filed non-communist affidavits and their supervisors—the President of the University of Arkansas and the Superintendent of Schools of Little Rock—had testified that their services were satisfactory and their continued services very much wanted.

In sustaining the validity on its face of Act 10, the Arkansas Supreme Court recognized that its use in a discriminatory manner might make the statute invalid in application. It was argued by respondents that there is no infringement of petitioners' rights, since Act 10 does not provide for any automatic dismissal because of any organization to which petitioners may have belonged or to which they may have contributed. It is true that the Act does not provide for such automatic dismissal, nor are any particular organizations proscribed. It is equally true, however, that the Act does not provide that the affidavits filed or the information contained therein should be held in confidence by the school authorities with whom the affidavits are filed. Consequently, any school governing body on its own or when subjected to public pressure, may well make public such affidavits in whole or in part.

A representative of the Capital Citizens Council, an organization dedicated to non-compliance with this Court's decisions in regard to school desegregation, testified that his organization would seek to obtain information in regard to organizations to which teachers belonged and would attempt to have discharged teachers who had supported organizations unpopular with the Citizens Councils (R.148). Among such organizations were named The American Civil Liberties Union, The Urban League, and the American Association of University Professors (R.151).

In commenting on this testimony and the use to which the information obtained through the Act 10 affidavits would be put, the Arkansas Supreme Court said:

> "The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the State meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.
>
> "We do not think this testimony sufficient to show that the Act will be applied by the State and its agencies in such a way as to violate the appellants' constitutional rights."

Here again we submit that the court below fell into error in assuming that direct action by a State agency under a challenged statute is necessary to the invalidity of such statute.

This Court has frequently recognized that an indirect restraint upon the exercise of constitutional rights may be just as effective and invalid as a direct one. See *N.A.A.C.P.* v. *Alabama, supra; American Communications Association* v. *Douds*, 339 U.S. 382; *Watkins* v. *United States, supra; Bates* v. *City of Little Rock, supra.*

It is clear then that a statute which compels disclosure of associations may be unconstitutional without further direct governmental action of a punitive nature, if the governmentally forced disclosure sets in motion private action which has the effect of depriving one of his constitutional rights. The crucial factor is the interplay of governmental and private action. *N.A.A.C.P.* v. *Alabama, supra.*

As already pointed out, Act 10 makes no requirement that the information contained in the affidavits required to be filed be kept confidential. Bruce Bennett, the Attorney General of Arkansas, on April 21, 1959, issued an official opinion to the Little Rock School Board, holding that disclosure of information contained in the affidavits is in the discretion of each governing school body (R.163). This feature of Act 10 alone distinguishes this case from *Beilan, supra,* where the Court pointed out in its opinion, at p. 401, that the interviews with the superintendent "were given no publicity and were attended only by petitioner, his superintendent and the assistant solicitor of the board".

Ostensibly Act 10 was passed for the purpose of providing assistance in the administration and financing of the public schools of Arkansas and institutions of higher

learning supported by public funds. Section 1 of the Act so declares and further makes a determination that it will be beneficial to the schools if affidavits as required by the Act are provided.

Section 7 of the Act, the emergency clause, comes closer to a statement of the real purpose for which this legislation was enacted. That section reads: "It is hereby determined that the decisions of the United States Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately, and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this Act is to assist in the solution of these problems and to provide for the more efficient administration of public education."

The purpose here is scarcely veiled. It is implicit in the language of Section 7 that the purpose of the Act is to resist compliance with *Brown* v. *Board of Education*, *supra*. If this is the purpose, and there can be no reasonable doubt on this score, then the interest of the State is not only less than compelling, it is itself unlawful.

C. This Petition Raises Issues Similar to Those Already Pending Before the Court

There is now on appeal to this Court another case, which arose in the Federal District Court for the Eastern District of Arkansas, challenging the validity of Act 10, *Shelton, et al* v. *Ed I. McKinley, Jr., et al*, 174 F. Supp. 351, decided June 8, 1959, by a three-judge court which upheld the constitutionality of the Act.

Although the basic questions of the constitutionality of Act 10 are similar in both cases, petitioners feel that there are substantial differences in the records which would make a consideration of both cases helpful to the

Court in properly determining the grave constitutional issues presented. In the *Shelton* case, the plaintiff took the position that it was beyond the power of the State to require him to supply any information as to his associations, and consequently he declined to do so.

Petitioners, on the other hand, recognized the right of school authorities to make some inquiry into their past and present associations as they might be relevant to and affect their character and fitness as teachers. Petitioners' contention, however, is that the Act goes beyond what the State may constitutionally compel in the way of disclosure of associations and activities.

There is also in the record of this case testimony showing the uses to which the Act is sought to be put and the actual intimidation of teachers in the exercise of their right of free association which will result if Act 10 is not invalidated. Further, the record completely negates the existence of any compelling public necessity which might justify the attempted invasion of individual freedoms.

Act 10 is designated to create exactly the opposite of the essential atmosphere of freedom which must prevail in our educational institutions if they are to perform their proper function in a free democratic society. This unjustified onslaught on academic freedom and the right of free association of public school teachers goes beyond any repressive legislative scheme yet devised and presented to any American court. This Court should decide the power of the state to so infringe upon rights guaranteed by the Fourteenth Amendment.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and this Court should review the judgment of the Supreme Court of Arkansas.

Respectfully submitted,

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May 4, 1960

APPENDIX

SUPREME COURT OF ARKANSAS

CARR *v.* YOUNG

5—1978

Opinion delivered February 8, 1960.

APPEAL FROM PULASKI CHANCERY COURT—AFFIRMED

GEORGE ROSE SMITH, J. This case involves the validity of the teacher-affidavit law, Act 10 of the 1958 special session. The appeal is from a declaratory decree upholding the statute. Two suits were consolidated in the trial court. In one the appellant Carr, an associate professor of music at the University of Arkansas, acting for himself and others similarly situated, sought a decree declaring the act unconstitutional and enjoining its enforcement by the defendants, the president and trustees of the University. The other case is a similar class suit brought by the appellant Gephardt, a vocational printing instructor at Little Rock Central High School, asking for like relief against the Little Rock Special School District and its superintendent and directors. Both plaintiffs assert that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought and allied rights, all protected by the Fourteenth Amendment and by parallel provisions in the Arkansas constitution.

Act 10 provides that no person shall be employed as a teacher in any of the state's public schools or as a superintendent or principal in any elementary or secondary school without having first filed with the employing authority an affidavit giving the names and addresses of

all organizations and associations to which the applicant has belonged within the preceding five years or to which he has paid regular dues or made regular contributions within that time. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract, and fix civil and criminal penalties for the willful filing of a false affidavit.

The appellants' attack upon the act may be considered in two aspects: First, is Act 10 unconstitutional on its face? Secondly, if the act is outwardly valid, does the record show that the statute was intended to be applied, and will in fact be applied, in such a way as to deprive the appellants and those they represent of their constitutional rights?

We do not find Act 10 to be invalid on its face. By §1 of the act the legislature declared its belief that the public school system would be benefited as a result of the school authorities having the required information about applicants for the positions covered by the statute. It cannot be doubted that the information would often be of real value to the employing school board. We are not convinced that either the federal or the state constitution compels a school board to engage its teachers without first inquiring about the matters that the act requires to be disclosed.

A similar question was presented long ago, in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517, where a policeman complained of a city regulation that prohibited him from soliciting money or aid for political purposes. In the familiar words of Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . the city may impose any reasonable condition upon holding offices within its control."

The appellants are not entitled to demand that the University and the Little Rock school board employ them without making any inquiry about organizations to which they have belonged within a period reasonably close to the date of the application. Such investigations are the usual practice among private employers, and, as the court pointed out in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, public employers are not denied the privilege of making similar inquiries. From that opinion: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The *prima facie* validity of Act 10 is pretty well settled by the holding in *Adler* v. *Board of Education of New York*, 342 U.S. 485, where the court sustained a state statute forbidding the employment in the public school system of persons belonging to organizations found to be subversive. This language in the opinion is peculiarly pertinent to the case at bar:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly

be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10.

We conclude, as did the three-judge district court in *Shelton* v. *McKinley*, D.C. Ark., 174 F. Supp. 351, that the act is not unconstitutional on its face. We do not, of course, pass upon the wisdom of the law, for as the court said in the *Shelton* case: "We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considerations of the legislative, not the judicial branch of the government."

There remains the contention that Act 10, even if ostensibly valid, is subject to being used in an unconstitutional manner. Upon this point the appellants offered three witnesses. Two of them, the Attorney General, whose office assisted in the drafting of the bill, and the state senator who introduced the measure in the legislature, testified that the act was intended as a weapon against subversion. Such expressions of individual opinion are not competent to show the legislative intention, *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W. 2d 1007, but even if the testimony were considered it would not create any doubt about the validity of the act.

The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.

We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state "with an evil eye and an unequal hand". *Yick Wo* v. *Hopkins*, 118 U.S. 356.

Here, however, the proof does not show any inclination on the part of any school board to use Act 10 in a discriminatory manner. The most that can be said is that at least some members of the Citizens Councils are so all-advised as to advocate that course. "Ill-advised" is the proper term, since such an effort, if successful, would defeat its own purpose by rendering the act invalid.

It is very far from certain that efforts to misuse Act 10, if any are made, will succeed. Inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone. The only testimony on this point indicates that the affidavits are not being publicized; the president of the University testified that its affidavits are being treated as confidential and are being kept under lock and key.

Moreover, even if secrecy should not be observed in every instance it still cannot be surely predicted that any teacher will be eliminated from the school system. Unlike the statute upheld in the *Adler case, supra*, which mandatorily forbade the employment of persons belonging to subversive organizations, Act 10 does not affirmatively require a school board to take any action, no matter what associations an affidavit may reveal. Thus in order for us to invalidate Act 10 at this stage of its existence we should have to assume, wholly without proof, that conscientious and responsible school board members will inevitably yield to a nebulous public insistence that the act be applied discriminatorily and in disregard of recognized constitutional guaranties. We are aware of

no principle that requires us to attribute improper motives to public officers as a means of enabling us to declare an act invalid.

Affirmed.

SUPREME COURT OF ARKANSAS

MAX CARR *et al.*,	)	
	)	
Appellants	)	
	)	
v.	)	No. 5—1978
	)	
R. A. YOUNG *et al.*,	)	
	)	
Appellees	)	

PETITION FOR REHEARING

Petitioners move that the Court grant a rehearing in captioned cause for the following reason:

The opinion is bottomed upon the erroneous premise that so long as no direct discriminatory action by public officials is based upon the compelled disclosure of associations required by Act 10, that First and Fourteenth Amendment rights of petitioners are not violated. The resultant interplay of governmental and private action set in motion by Act 10, in successfully dissuading teachers from exercising their constitutional rights, or making them targets of abuse if they do, through the publicity made possible by the Act, is ignored by the Court.

EDWIN E. DUNAWAY

Solicitor for Appellants

The admirable admonition contained in the Court's opinion against the use of Act 10 for the purpose for which it was enacted does not alter the fact that the Act makes no requirement that the information in the affidavits be treated as confidential. There is, consequently, provided by Act 10, with no necessity to justify it, the means by which teachers are subjected to the immediate possibility of publication of their past and present associations.

The United States Supreme Court recognized in *NAACP* v. *Alabama*, 357 U.S. 449, 78 S.Ct. 1163, at p. 1172, that such publication must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.

That court then answered this Court's argument that whatever repressive effect resulted from compelled disclosure follows from *private*, not *state* action. "The crucial factor is the interplay of governmental and private action, for it is only after the initial exercise of state power represented by the production order that private action takes hold," said the court at p. 1172.

In *Watkins* v. *United States*, 354 U.S. 178, 77 S.Ct. 1173, at p. 1134, the United States Supreme Court also recognized the constitutional evil of unnecessary forced revelations about possibly unpopular associations and the resultant deterrent effect upon one's exercising constitutional rights.

CERTIFICATE

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. Copies have been served upon opposing counsel by mailing same on February 16, 1960.

Edwin E. Dunaway